United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No 2037. 649

BELVA A. LOCKWOOD, APPELLANT,

vs.

FRANK M. RUCKER, ADMINISTRATOR OF THE PERSONAL ESTATE OF JAMES TAYLOR, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 23, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2037.

BELVA A. LOCKWOOD, APPELLANT,

vs.

FRANK M. RUCKER, ADMINISTRATOR, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 26, 1909.

In the Court of Appeals of the District of Columbia.

No. 2037.

BELVA A. LOCKWOOD, Appellant,
vs.
FRANK M. RUCKER, Administrator, &c.

---

a Supreme Court of the District of Columbia.

No. 49662. At Law.

FRANK M. RUCKER, Administrator of the Personal Estate of James Taylor, Deceased, Plaintiff,
vs.
BELVA A. LOCKWOOD, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Jul- 23, 1907.

In the Supreme Court of the District of Columbia, the 23d Day of July, 1907.

No. 49662. At Law.

FRANK M. RUCKER, Administrator of the Personal Estate of James Taylor, Deceased, Plaintiff,
vs.
BELVA A. LOCKWOOD, Defendant.

The plaintiff sues the defendant for money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff's testator for the defendant, at her request; and for money lent by the plaintiff's testator to the defendant; and for money paid

by the plaintiff's testator for the defendant at her request; and for money received by the defendant for use of the plaintiff's testator; and for money found to be due from the defendant to the plaintiff's testator on accounts stated between them.

And the plaintiff claims $8000.00 with interest at the rate of 6 per cent. per annum from the 5th day of July 1906 according to the Particulars of Demand hereto annexed, besides cost of this suit.

CHARLES A. MAXWELL,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Plaintiff.

2 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

CHARLES A. MAXWELL,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Plaintiff.

Pleas.

Filed February 24, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Adm'r, Plaintiff,
vs.
BELVA A. LOCKWOOD, Defendant.

Now comes Belva A. Lockwood, defendant in the above entitled cause and for a plea to the declaration herein filed by the plaintiff, says that she never promised and undertook in the manner and form in the said declaration supposed.

II.

And for a further plea to the said declaration, the said defendant says that she is not and never was indebted to the said plaintiff or to the intestate of the said plaintiff in the manner and form in the said declaration supposed.

3 III.

And for a further plea to the said declaration, said defendant says that she does not owe to the said plaintiff the amount claimed in and by the said declaration, or any part thereof.

IV.

And for a further plea to the said declaration, the said defendant says that the said plaintiff, as administrator of the estate of James

Taylor, deceased, is indebted to her in the sum of Two thousand, six hundred ninety-four dollars and sixty-eight cents ($2694.68) on account of work done and materials furnished by the said defendant to the said intestate and on account of money loaned by the said defendant to the said intestate of the said plaintiff; and on account of money had and received by the said intestate of the said plaintiff to the use of the said defendant; and on account of moneys found to be due to the said defendant from the said intestate of the said plaintiff upon account stated between them.

WM. H. ROBESON,
CHAS. A. KEIGWIN,
Attorneys for Defendant.

4 *Joinder of Issue.*

Filed August 28, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Adm'r,
vs.
BELVA A. LOCKWOOD.

The plaintiff by his attorneys joins issue on the defendant's pleas.

CHAS. A. MAXWELL,
SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiff.

Replications to Amended Pleas.

Filed February 24, 1908.

In the Supreme Court of the District of Columbia.

No. 49662.

RUCKER, Adm'r,
vs.
LOCKWOOD.

Now comes the plaintiff and joins issue on the first, second and third amended pleas of the defendant.

As to the fourth plea of the said defendant the said plaintiff for replication thereto says that for a first replication neither he
5 nor his intestate ever was indebted as alleged; for a second replication that neither he nor his intestate ever promised as alleged and for a third replication the plaintiff says that the alleged

cause of action in said fourth plea mentioned did not accrue within three years prior to the institution of this suit.

SAM'L A. PUTMAN,
CHAS. A. MAXWELL,
CHAS. POE, *Att'ys for Pl'ff.*

Rejoinder to the Replications of Plaintiff.

Filed February 24, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Administrator, Plaintiff,
vs.
BELVA A. LOCKWOOD.

Now comes the defendant, Belva A. Lockwood, and joins issue with the plaintiff upon his replication to the fourth plea of the said defendant.

WM. H. ROBESON,
CHAS. A. KEIGWIN,
Attorneys for Defendant.

6 *Memorandum.*

March 8, 1909.—Verdict for Plaintiff for $5650 at 5% interest from July 5, 1906.

Opinion.

Filed April 3, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Administrator, Plaintiff,
vs.
BELVA A. LOCKWOOD, Defendant.

Disposing of the Motion for a New Trial.

The plaintiff sues the defendant for the breach of a contract to pay his decedent one half the fee that she should receive for carrying through certain cases concerning the rights of the Eastern Cherokees to a fund in the hands of the government. The case was tried by the jury which found a verdict for the plaintiff for the amount claimed. The defendant now moves for a new trial, first,

because the verdict was not supported by the evidence; second, because the verdict was contrary to the evidence; third, because the court erred in excluding certain testimony offered by her. The first two are considered insufficient for the same reasons which led the court to submit the case to the jury at the trial. The third
7 ground will be examined more particularly.

a. The defendant offered to testify that the decedent never sent to her the 865 powers of attorney mentioned in the contract which forms the basis of the suit. The contract did not stipulate that the decedent should send her the powers of attorney. It only stated that the decedent and the defendant should be "equally interested in a power of attorney and contract held by the decedent for 865 Eastern Cherokees." Whether he sent 865 powers of attorney appears to be immaterial. If it was material it was a communication or transaction between the decedent and the defendant, as to which the statute provides that she shall not testify.

b. The defendant offered to testify that she is now in the prosecution of claims for Eastern Cherokees under powers of attorney transmitted to her by the decedent. This, too, appears to the court to be immaterial. The court is unable to see how the rights of the decedent can be affected by what the defendant is now doing in the prosecution of such claims.

c. The plaintiff introduced the depositions of two witnesses—sons of the decedent, who testified therein that they were present at an interview between the decedent and the defendant in which the defendant informed the decedent of the amount of the fee which she had already received and of the amount which she expected to receive, and promised to send him a certain amount as his share thereof in addition to the One Thousand Dollars which she
8 had already sent him. Thereupon the defendant offered to testify that she did not make these statements. She did not offer to testify that she was not present, nor that no such conversation took place, but that she did not say the things which the deponents testified to her having said. The occurrence to which the deponents testified was a transaction or communication between the decedent and the defendant. The Code for the District of Columbia, section 1064, declares that,

"If one of the original parties to a transaction or contract has, since the date thereof, died * * * the other party thereto shall not be allowed to testify as to any transaction with or declaration or admission of the said deceased * * * party in any action between said other party * * * and the administrators * * * representing the deceased * * * unless he be first called upon to testify in relation to said transaction or declaration or admission by the other party, or the opposite party first testify in relation to the same."

There are other clauses in the section but they do not affect the question now presented. If the administrator had testified to this transaction, declaration or admission of the defendant she would have been a competent witness to the same matter but the administrator did not testify. The deponents, although they may be in-

terested in the result of the suit, are not the "opposite party." It is the administrator and he alone who has a right to object to the defendant's testifying. Pattee *vs.* Whitcomb, 72 N. H. 249; 30 Am. & Eng. Enc. L. (2d Ed.) 1025. The fact that a third person was present at the transaction between the decedent and the defendant and the fact that such third person testifies thereto does not constitute a waiver of the administrator's right to object to the competency of the defendant as a witness to the same transaction. 30 Am. & Eng. Enc. L. (2d Ed.) 1027, where the rule is thus stated, "The presence of a third person at the transaction or conversation between the witness and the decedent, and participation therein by such third person, does not render the witness competent to testify against the representatives of the decedent." See also page 1041. And again at page 1058, of the same work, "Where the representative of the person deceased, without testifying himself, calls a disinterested third person as a witness and examines him concerning transactions or communications between the person deceased and the opposite party, it is generally held that the incompetency of the opposite party is not waived so as to permit him to rebut the evidence of the third person." It is there stated that the contrary authorities are due to statutes that expressly provide that in such a case the opposite party may testify. The case nearest in point upon this precise question would seem to be Pinney *vs.* Orth, 88 N. Y. 447, which arose under a statute practically like our own in this respect. In that case the plaintiff administrator had introduced a witness who testified to conversations in his presence between the deceased and one of the defendants, and it was held that said defendant was competent to testify that the plaintiff's witness was never present at the place specified when any conversation or transaction occurred between the defendant and the deceased, and that the interviews between the defendant and the deceased did not occur at the place named by the witness, but that he was not competent to testify as to anything that was or was not said or done between them. This seems to the court to be sound, for surely it is testifying "as to a transaction or communication" to testify that the defendant did not say or do the thing claimed as much as it would be to testify to what did occur. So it has been held that a witness within the rule of exclusion is not competent to prove that he has not been paid for a service rendered to the decedent, since testimony negativing a transaction is as clearly within the inhibition as that in affirmation thereof. 30 Am. & Eng. Enc. L. (2d Ed.) 1039, and cases there cited. The policy of the statute is to place the decedent and the defendant on a level so far as transactions and communications between them are concerned. This was a transaction or communication between the decedent and the defendant. He is dead and cannot testify. She is disqualified by the statute. The fact that there are other persons living who may testify, and who in fact do testify for the plaintiff instead of for the defendant, can have no effect upon the rule. It is simply her misfortune that the witnesses testify as they do. The fact still remains that the de-

cedent is disqualified by death which is, in the eyes of the law, a fair offset to her disqualification by statute.

Accordingly the motion must be overruled.

WENDELL P. STAFFORD, *Justice.*

April 2, 1909.

11 Supreme Court of the District of Columbia.

FRIDAY, *April* 2, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49662.

FRANK M. RUCKER, Administrator of the Personal Estate of James Taylor, Deceased, Pl't'f,

vs.

BELVA A. LOCKWOOD, Def't.

This cause coming on to be heard upon the defendant's motion for a new trial, the same having heretofore been argued and submitted to the Court, it is ordered that said motion be, and it is hereby overruled.

Therefore it is considered that the plaintiff recover against the defendant Six thousand four hundred thirty-four and 22/100 dollars ($6434.22) with interest thereon from this date, being the money payable by her to the plaintiff, by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

12 April Term, 1909.

Proceedings before the Supreme Court of the District of Columbia, holding a Circuit Court, Division No. 1 in and for said District, commencing the first Tuesday, it being the 6th day of April, 1909.

TUESDAY, *April* 6, 1909.

By order of Honorable Wendell P. Stafford, Associate Justice of said Supreme Court presiding, the Court is opened by proclamation of the Marshal, pursuant to rule of the Court.

* * * * * * *

At Law. No. 49662.

FRANK M. RUCKER, Administrator of the Personal Estate of James Taylor, Deceased, Pl't'f,

vs.

BELVA A. LOCKWOOD, Def't.

Now comes here the defendant in open Court and notes an appeal to the Court of Appeals of the District of Columbia, and upon

motion, the penalty of the bond on said appeal, to act as a supersedeas is hereby fixed in the sum of Eight thousand dollars ($8000.) and the cost bond in the sum of one hundred dollars ($100).

Memorandum.

April 23, 1909.—Supersedeas bond approved and filed.

13 *Motion to Strike Out Approval of Bond and Dismiss Appeal.*

Filed April 27, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Adm'r,
vs.
BELVA A. LOCKWOOD.

Now comes the plaintiff by his attorneys, and moves the Court to strike out the alleged approval of the defendant's bond on appeal and to dismiss her said appeal to the Court of Appeals and assigns the following grounds for his motion:

First. That the said appeal bond was inadvertently approved by Mr. Justice Barnard, no notice of the application for such approval having been previously given to the plaintiff or his attorneys as required by the rules and practice of this Court, and said approval is therefore inoperative and void.

Second. Because no approved bond on appeal to the Court of Appeals has been filed by the said defendant though the time within which such approved appeal bond should be filed has expired.

Third. For other good and sufficient reasons to be hereafter assigned.

S. A. PUTMAN,
CHAS. POE,
C. A. MAXWELL,
Pl'ff- Att'ys.

14 To William H. Robeson, Esq., and Belva A. Lockwood:

You are notified hereby that the above motion will be called for hearing before Mr. Justice Stafford in the room usually occupied by him as a Court room on Friday, April 30, 1909, at ten o'clock A. M. or as soon thereafter as counsel can be heard.

SAM'L A. PUTMAN,
CHAS. POE,
C. A. MAXWELL,
Pl'ff's Att'ys.

Supreme Court of the District of Columbia.

SATURDAY, *May* 8, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

At Law. No. 49662.

FRANK M. RUCKER, Administrator of James Taylor, Deceased, Pl't'f,
vs.
BELVA A. LOCKWOOD, Def't.

Now comes here the defendant by her Attorneys and prays the Court to sign, seal and make part of the record, her bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

Further, upon motion of the defendant, it is ordered that the time within which to file the transcript of record in the Court of Appeals of the District of Columbia in this cause be, and it is hereby
15 extended to and including June 15, 1908.

Bill of Exceptions.

Filed May 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Administrator of James Taylor, Deceased, Plaintiff,
vs.
BELVA A. LOCKWOOD, Defendant.

Messrs. Samuel A. Putman and Charles Poe, Attorneys for Plaintiff.

GENTLEMEN: Take notice that it is proposed that the within Bill of Exceptions in the above entitled cause, of which a copy is this day served on you, shall be settled before Mr. Justice Stafford, holding Circuit Court No. 1, on Saturday, the eighth day of May, at ten o'clock A. M., or as soon thereafter as counsel can be heard.

WILLIAM H. ROBESON,
HENRY P. BLAIR,
Attorneys for Defendant.

Service of the above notice with copy of proposed Bill of Exceptions acknowledged this 28 day of April, A. D. 1909.

CHAS. POE,
Of Attorneys for Plaintiff.

* * * * * * *

16 Be it remembered that at the trial of this cause before Mr. Justice Stafford, one of the Justices of the Supreme Court of the District of Columbia, and a jury duly impaneled and sworn to try the issues, Mr. Charles Poe appeared for the plaintiff and Mr. William H. Robeson for the defendant.

Whereupon the plaintiff, to maintain the issues on his part joined, offered in evidence a certain contract, which contract the defendant admitted was duly executed by her. The same was duly admitted in evidence and is as follows:

"That, Whereas: The said Belva A. Lockwood, party of the first part, holds a certain contract from the Commissioners and Delegates of the Eastern Cherokees, coupled with a Power of Attorney, for the purpose of prosecuting in the United States Congress and the Courts, the claim of said Eastern Cherokees to $334,297.75 with interest thereon at 5% from June 12, 1838; said amount having been found due to them by the Secretary of the Interior February 3, 1883; and also to prosecute their share of the allotments of Western Lands, and for their pro rata share of the proceeds of sales of Western Lands already sold under the Treaty of 1866, and also their pro rata share of the $4,409,962.46, found due to the Cherokee Nation in an accounting by the Secretary of the Interior, and in accordance with an agreement made with the Cherokee Nation at Tahlequah, Indian Territory, Dec. 19, 1891, and approved by Congress March 3, 1893, and other matters against the Cherokee Nation and the United States.

And, Whereas, this contract contains a promise of a fee of 15% to the said party of the first part, for her services rendered, and to be rendered, and whereas the said James Taylor, party of the second part has also rendered valuable services in the above recited claims, and intends to continue such service, it is therefore agreed by and between the parties to this contract, that in consideration of mutual service rendered, and to be rendered, and other good and valuable considerations between the parties hereto; that the said parties

17 of the first and of the second part shall be equally interested in each and every recovery that may be had, or allowance made or secured through these premises, and that such recovery and allowance shall be equally divided between the said Belva A. Lockwood, and James Taylor, and that said Belva A. Lockwood shall also be equally interested in a Power of Attorney and contract held by said Taylor for 865 Eastern Cherokees now citizens of the Cherokee Nation, Indian Territory, and also the ¼ interest of said Taylor in what is commonly known as the Erwin and McCloud interest of the 35% of the Old Settler Cherokee Claim, now pending in the United States Congress.

(Signed) BELVA A. LOCKWOOD.
JAMES TAYLOR.

Executed before a Notary.

THOS. J. STALEY.

The plaintiff also offered in evidence a certified copy of the decree of the Court of Claims, which was duly admitted and is in words and figures following:

"Court of Claims."

No. 23199.
No. 23214,
No. 23212,

"THE CHEROKEE NATION,
THE EASTERN CHEROKEES,
THE EASTERN AND EMIGRANT CHEROKEES
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the annexed is a true copy of the Decree as to fees of Counsel, filed by the Court May 28, 1906, in the above-entitled causes.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this first day of June, A. D. 1906.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

This Decree may be entered this 28th day of May, 1906.
(S. J. P.)

18 In the Court of Claims.

No. 23199.
No. 23214,
No. 23212,

THE CHEROKEE NATION,
THE EASTERN CHEROKEES,
THE EASTERN & EMIGRANT CHEROKEES
vs.
THE UNITED STATES.

These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to the Court that by the said mandate it is provided that the second sub-division of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the Treaties of 1835-36 and 1846, exclusive of the Old Settlers, it is therefore so ordered and decreed.

And in accordance with said decree as it was directed to be, and is now, modified, it is further ordered and decreed that the Secretary of the Interior prepare or cause to be prepared a list or roll of all persons coming within the said description entitled to share in the

distribution of said fund; and in preparing the said list or roll of such persons, the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851 upon which the per capita payment to the Eastern Cherokees was made, and make such distribution in pursuance of Article 9 of the treaty of 1846.

And this cause coming on to be further heard upon the application of Robert L. Owen and Robert V. Belt, attorneys of record for the Eastern Cherokees, and Mrs. Belva A. Lockwood, attorney of record in behalf of certain individual claimants styled "Eastern and Emigrant Cherokees," for the allowance of compensation to them and their associates as attorneys for the respective parties, and the Court having considered the evidence offered by them and heard the argument of counsel, and being fully advised in the premises, and being of the opinion that a sum equal to fifteen per centum of the amount due and payable, under the terms of this modified decree, to the Eastern Cherokees, to wit, one million, one hundred and eleven thousand, two hundred and eighty-four dollars and seventy
19 cents, with interest from June 12, 1838, to date of payment, will be a reasonable compensation to the said Robert L. Owen and Robert V. Belt and their associates, attorneys for the Eastern Cherokees, and to Mrs. Belva A. Lockwood, attorney for certain individual claimants styled Eastern and Emigrant Cherokees, it is therefore, this 28th day of May, 1906, adjudged, ordered and decreed that out of said sum named in item two of the decree, payable to the Eastern Cherokees there shall first be deducted an amount equal to fifteen per centum thereof principal and interest as the compensation of said attorneys.

And it further appearing to the Court that of this fifteen per centum the sum of eighteen thousand dollars is a reasonable fee to be paid to the said Mrs. Belva A. Lockwood for her services rendered in this behalf it is therefore ordered adjudged and decreed that out of the said amount there shall be paid to the said Belva A. Lockwood the said sum of eighteen thousand dollars.

It is further ordered adjudged and decreed that the said fifteen per centum less the deduction of the said eighteen thousand dollars shall be distributed and paid to the following persons in the proportion named to wit:

To John Vaile 3% of such gross recovery less.....	$3600.
To Robert V. Belt 1⅔% of such gross recovery less.....	2000.
To Scarritt & Cox 2% of such gross recovery less.....	2400.
To James K. Jones 1% of such gross recovery less.....	1200.
To Matthew C. Butler 1½% of such gross recovery less....	1800.
To William H. Robeson 1½% of such gross recovery less...	1800.
To Robert L. Owen 4⅓% of such gross recovery less.....	5200.

It is further ordered, adjudged and decreed that the payment of the said fifteen per centum be made by the Secretary of the Treasury as herein directed, immediately upon the appropriation by Congress for the payment of this judgment."

The plaintiff also offered and gave in evidence a certain letter from the defendant, which is in words and figures following:

"WASHINGTON, D. C., *July* 26, 1906.

James Taylor, Esq.

DEAR SIR: I got your letter and was very glad to hear from you. I am glad that you are still among the living and able to get
20 around. I have had a long hard fight on the Cherokee case and many vicissitudes but we won out bravely at last although I did not get as much money as I expected but thereis more coming, and I want you to have something for your comfort while you live. I enclose you draft on New York, certified, for $1000.00 and I want you to give John M. one-half of it. He has done a good deal to help us, and he needs the money. Money makes money and we will all be all right soon. You must stay in the Indian Territory because that is where your children and your interest is. I will look after the North Carolina land and write you about it soon. The case is in good shape and ready for trial, and has been for a long time.

Yours truly, BELVA A. LOCKWOOD."

Further to maintain the issues joined, plaintiff read the deposition of JAMES L. TAYLOR. His deposition is as follows:

My residence is Pryor Creek, Oklahoma; age 47. I knew James Taylor deceased and I know the defendant. I was present at a conversation between the defendant and James Taylor, deceased, at Muskogee, in the fall of 1906. Mrs. Lockwood stated to my father, James Taylor, when he asked as to his part of the fee due him out of the imigrant Cherokee case, that she had sent him a thousand dollars and would as soon as the court had paid her her fee, remit him the remainder of his part, being eight thousand dollars. She stated that she had only advanced him this thousand dollars after the decree of the court, claiming she had not received the fee. On her being asked as to the request in her letter accompanying the thousand dollars, as to giving his son John M. Taylor five hundred dollars, she stated that she had charged the whole amount to James Taylor. James Taylor's physical condition was very feeble. He was almost helpless and his hearing was defective, but his mind was clear.

21 On cross-examination he testified that the conversation took place in the private room of Mrs. Lockwood at the Katy Hotel; that James Taylor, William Taylor, Mrs. Lockwood and witness were present; that he did not tell Mrs. Lockwood that his father was in such physical and mental condition that he himself had been obliged to wash and dress him; that on that day Mrs. Lockwood gave James Taylor ten dollars.

Further to maintain the issues joined, plaintiff read the deposition of William Taylor. His testimony is as follows:

His residence is Claremore, Oklahoma; age 41. James Taylor was his father. The witness was present on the 17th of November, 1906, when there was a conversation about the fee. Witness' brother, James L. Taylor, asked Mrs. Lockwood in witness' presence, about this thousand dollars which she had sent to James Taylor. Witness' brother asked her if the thousand dollars was charged to James

Taylor, or half of it to John Taylor, another brother. She said it was all charged to James, the father. Witness' father then spoke to her and asked her when they would get their fee. She replied "We have done won it and we are to get $18,000, but I haven't got it out yet, but as soon as I do, I'll pay you your part, which would be $8,000 due you yet, as you are old and feeble and you ought to have it and get the good of it while you live. James Taylor's physical condition was very feeble and he was hard of hearing, but his mind was good.

22 Counsel for plaintiff then announced his testimony closed.

The foregoing is the substance of all the evidence offered on behalf of the plaintiff.

Whereupon the defendant called in her behalf and examined R. V. Belt, who testified that he was a lawyer, had been engaged in the practice for about sixteen years; was familiar with the litigation in the Court of Claims on the part of the Cherokee Nation and the Eastern Cherokee against the United States, respecting the claim described in the contract between James Taylor and the defendant, as the claim of $4,409.000; that in that litigation he himself was the attorney for and represented the Eastern Band of Cherokees, which was comprised of those Cherokees who remained east under the treaty of 1836, and whose places of residence were in North Carolina, South Carolina, Tennessee, Alabama, Georgia and Virginia; that he represented this Eastern Band of Cherokees in accordance with resolutions passed by their council; that he had the contract in hand while he was testifying; that the resolution authorizing the making of the contract was passed on November 5, 1895, that the contract was signed by the representatives of the Indians at that time and by himself on December 5, 1895, and was approved by the Secretary of the Interior on January 6, 1896.

On cross-examination he stated that he was awarded a fee as the representative of the Eastern Band of Cherokees that Mrs. Lockwood was awarded a fee, his own fee being reduced about $2000. for the purpose of making up the fee allowed to Mrs. Lockwood and

23 that the fees of other attorneys to whom allowances were made, were reduced in like proportion. These various sums were deducted from the fees allowed to the other attorneys by the Treasury Department. The payment was made July 5, 1906.

The defendant was then examined in her own behalf. She testified that she was born October 24, 1830, and that she had been a practicing attorney for thirty-three years; that she did not appear in the Court of Claims in the litigation regarding the claim for $4,409,000, on behalf of the Eastern Band of Cherokees; that she did appear for individual members of the Eastern Cherokees; that the Eastern Band of Cherokees was represented by Mr. Belt (the preceding witness); that she presented to the Court of Claims in the litigation in question, as her authority for appearing there, over a thousand powers of attorney from individuals who were Eastern Cherokees resident either east of the Mississippi River or in the Indian Territory; that the powers of attorney were all executed to her, that they were all alike. At this point a copy of one of the

powers of attorney was offered and given in evidence, the same being as follows:

"Power of Attorney."

Know all men by these presents, That we, the undersigned, Eastern or Emigrant Cherokees, have made, constituted and appointed, and by these presents do make, constitute and appoint Belva A. Lockwood of Washington, D. C., our true and lawful attorney for us and in our name, place and stead, hereby annulling and revoking all former Powers of Attorney whatever in the premises, to prosecute and collect for us in Congress or the Courts, our pro rata share of the Removal and Subsistence Fund wrongfully taken
24 by the Government from the Five Million Fund and belonging to the Eastern or Emigrant Cherokees, payment promised in 1893, and sent to the Court of Claims for adjudication under Senate Resolution No. 3681 of the 56th Congress February 20, 1901, Suit No. 10,386 in which we desire to intervene, and we hereby agree to allow our Attorney 15 per cent. of the amount so recovered. Giving and granting unto our said attorney full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present at the doing thereof, with full power of substitution.

In testimony whereof, we have hereunto set our hands and seals this 26th day of October, 1901.

J. A. POWELL. [SEAL.]
E. J. POWELL. [SEAL.]

Malay Roll 1848.
No. 1374 Mother's Number.

Two witnesses who can write:
D. S. RUSSELL.
J. N. SPARKS.

NORTH CAROLINA,
Cherokee County, ss:

Personally appeared before me, the undersigned, a Notary Public, in and for the said State and County, John A. Powell to me well known to be the person who signed the foregoing letter of attorney, and the same having been read over to him and the contents thereof fully explained, do acknowledge the same to be his act and deed.

In testimony whereof, I have hereunto set my hand and seal this 26 day of October, 1901.

D. S. RUSSELL,
Notary Public."

Witness then testified that the power of attorney here set out was selected at random from the numerous powers she had. She had a list of all the powers of attorney which she presented to the Court of Claims. Thereupon the plaintiff offered and gave in evidence the said list, upon which were the names of 5,832 persons.

25 The witness continuing, testified that these powers of attorney were filed at different times during the progress of the litigation, the one offered in evidence having been filed on October 31, 1901; that the court allowed her a fee of $18,000. but she had received but $14,000, after paying her counsel.

It was here agreed between counsel that expenses chargeable to the fee received by Mrs. Lockwood, including counsel fees paid by her, comprised a total of $4,700. so that the net amount of her fee was $13,300.

The witness, continuing, testified that she was present at the time and place named by James L. Taylor and William L. Taylor in their depositions, namely, at Muskogee, Oklahoma, in November, 1906, and that she had heard their depositions read. Thereupon, and in the further examination of the defendant, her counsel propounded to her the following question:

Q. I call your attention to the statement by James L. Taylor that he was present at this conversation between you and his father, James Taylor, and that you stated to his father in his presence, that you had sent him $1000, and would, as soon as the court had paid your fee, remit him the remainder of his part, being $8,000; that you stated that you had advanced him this $1000 after the decree of the court, but claimed that you had not yet received the fee; I ask you if you made any of those statements to James Taylor, deceased, in the presence of this witness, James L. Taylor.

26 To which question the plaintiff objected and the objection was sustained by the court; to which ruling and action of the court, the defendant by her counsel then and there excepted, and the exception was noted by the Justice presiding, on his minutes.

Thereupon counsel for defendant stated to the court that he proposed by this question to prove by this witness that she had not stated at the time and place in question, that she would remit James Taylor $8,000 or any other sum as his part of her fee; that she had not claimed that she had not yet received her fee. Thereupon, and in the further examination of the defendant, her counsel propounded to her the following question.

Q. William Taylor gives similar testimony to that given by James L. Taylor, stating that you said you had advanced the thousand dollars, that you were to get $18,000, but you had not received it at that time; but that when you received it, you would pay $8,000 as the balance yet due James Taylor. I will ask you if that statement of the witness William Taylor is true?

To which question the plaintiff objected and the objection was sustained by the court; to which ruling and action of the court the defendant by her counsel then and there excepted, and the exception was noted by the Justice presiding, on his minutes.

Thereupon and in a further examination of the defendant, her counsel propounded to her the following question:

Q. I will ask you if in that conversation you made any
27 statement admitting any right of James Taylor to any interest whatever in the fee you had received in the Eastern Cherokee case, in the Court of Claims?

To which question the plaintiff objected and the objection was sustained by the court; to which ruling and action of the court, the defendant by her counsel then and there excepted and the exception was noted by the Justice presiding, on his minutes.

The witness continuing, testified that James Taylor sent her his individual power to represent him; that his sons and daughters did likewise; that about three-fourths of the powers of attorney which she presented to the Court of Claims, came directly from the individuals themselves; that she had several correspondents who secured and sent her such powers of attorney, among them, John M. Taylor, James H. Whittaker of Stokes County, North Carolina, perhaps 200 cases, Cyrus W. Henry, about 50 cases, Mr. Andes of Knoxville, about fifty cases, and that she received also from other correspondents a number of powers of attorney which were among those presented by her to the Court of Claims.

She testified further that the fund realized from the judgment had not yet been disbursed; but that the roll was being made up by a Special Commissioner of the Court of Claims, who is yet to report his action to the court; and that she was appearing before this Special Commissioner almost every day in behalf of all these people from whom she had received, from various sources, the powers of attorney.

28 At the time of her conversation with James Taylor, in the presence of his sons who have testified, and of two of his daughters, she had received her fee. Her fee was paid about July 5, 1906. After the making of the contract between herself and Taylor, she never had any conference or correspondence with him respecting the claim upon which this suit was brought and on which judgment was recovered.

Thereupon and in the further examination of this defendant, her counsel propounded to her the following questions:

Q. What were the relations between the family of James Taylor and your own family, as to the intimacy of the two?

To which question the plaintiff objected and the objection was sustained by the court; to which ruling and action of the court the defendant by her counsel, then and there excepted, and the exception was noted by the Justice presiding, on his minutes.

Counsel for defendant then stated that it was his purpose to show by this question, by this witness, that the relations between the families were intimate and that Mrs. Lockwood, the defendant, advanced Mr. James Taylor the thousand dollars as representing a portion of the fees she expected to recover in the prosecution of the individual claims for enrollment, before the Special Commissioner; and that there would be, as she then thought, a sum in excess of that amount due James Taylor under the powers of attorney he had secured and that he, being physically and mentally infirm, and in poverty, and having always been her friend, the advance was made.

29 By the COURT: That would be showing that the transaction was a gift out of sympathy or kindness, instead of a payment. I will exclude it and give you an exception.

To which ruling and action of the court, the defendant by her counsel then and there excepted, and the exception was noted by the Justice presiding, on his minutes.

Thereupon, and in the further examination of the defendant, her counsel propounded to her the following question:

Q. If you are successful in the prosecution of the claims of these individuals for their pro rata shares of this fund before the Special Commissioner of the Court of Claims, will there be as much as the thousand dollars that you paid to Taylor due to him on account of the powers of attorney furnished you by him, under which you are proceeding?

To which question the plaintiff objected and the objection was sustained by the court; to which ruling and action of the court the defendant by her counsel then and there excepted, and the exception was noted by the Justice presiding, on his minutes.

Counsel for defendant stated that it was his purpose to show by the answer of this witness to that question, that at the time this thousand dollars was sent to James Taylor, she believed a larger sum than that would be due him as his half of the fees to be derived under the powers of attorney he had secured.

Thereupon counsel for the defendant propounded to her the following question:

30 Q. This contract between you and James Taylor recites that Taylor holds 856 powers of attorney from Eastern Cherokees, in which you were to become equally interested. I will ask you if he ever delivered any of these 856 powers of attorney to you?

To which question the plaintiff objected and the objection was sustained by the court; to which action of the court the defendant by her counsel then and there excepted and the exception was noted by the Justice presiding, on his minutes.

Whereupon counsel for defendant stated that it was his purpose to show by this witness, in answer to the question that James Taylor never delivered to her any of the 856 powers of attorney which were referred to in her contract with him as being his property and in his possession and further that he did not have 856 powers of attorney, and that he had nothing more than a list containing the names of 856 persons who, he said, were Eastern Cherokees.

On cross-examination, the witness stated that she had known James Taylor since 1874 or 1875; that she had been at work for the Cherokees in various capacities, since '75; that she had been working for James Taylor in a matter of his own; that Taylor was a feeble, imbecile old man of 86 years when he died; that it was because he was feeble and imbecile that she sent him $1000; she was afraid he might suffer want and his son had written to her that he was poor and helpless; that he could read and write; that he was a very bright man about a great many things, but never

31 brought anything to a focus; that Taylor himself dictated the contract sued upon.

Q. This contract recites in consideration of services rendered and

to be rendered to you by James Taylor—what services had he rendered at that time? A. To me? Not any services to me.

Q. What services had he rendered at the time of the execution of the contract, March 8, 1897? A. In what way?

Q. I do not know. A. I do not know.

Witness, continuing her cross-examination, testified that of the amount received by her as her fee, she paid $10,500 in satisfaction of a trust on her house.

On re-direct examination she stated that at the time of her meeting with James Taylor and his two sons in 1906, she had received her fee.

Counsel for defendant then announced his testimony closed.

The foregoing is the substance of all the testimony offered by both plaintiff and defendant.

The court charged the jury as follows:

The COURT: I think I need not charge the jury at length in this case. Counsel have agreed on the question to be submitted to you gentlemen; there is no difference between them as to the law applying to the case so far as you are concerned, as they both say it is simply a question as to whether this money was received under this
32 contract between her and the Indians, recited in her contract with James Taylor. They had discussed the evidence bearing on that question, and if I should go over it, it might be thought that I was partial one way or the other. The burden of the proof is upon the plaintiff to make out by a fair preponderance of testimony, that the case is with the plaintiff instead of the defendant. I hand you the writ and the writ contains a copy of the contract typewritten. If you desire to read that, you may do so from the writ itself.

After the noting of the said exceptions hereinbefore set forth, and the making of the same a part of the record, which is also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that the defendant may have her case reviewed on appeal by the proper court, the defendant by her attorneys moves the court to sign and seal this, her Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is by the Court granted; and thereupon the defendant tenders this, her Bill of Exceptions, and requests the Court to sign and seal the same according to the statute in such cases made and provided and it is accordingly done, now for then, this 8th day of May, A. D. 1909.

WENDELL P. STAFFORD, *Justice.* [SEAL.]

33 *Directions to Clerk for Preparation of Transcript of Record.*

Filed May 15, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49662.

FRANK M. RUCKER, Administrator of Personal Estate of James Taylor,
vs.
BELVA A. LOCKWOOD.

1. Declaration, omitting affidavit,
2. Pleas, omitting affidavit & exhibits,
3. Joinder of Issue,
4. Replication to Amended Pleas,
5. Rejoinder to Replication,
6. Memoranda of Verdict,
7. Judgment for Plaintiff for $6,434.22, and interest from date at six (6%) per cent. until paid,
8. Appeal noted, and supersedeas bond filed for $8,000 and costs,
9. Motion of Plaintiff to strike out Appeal Bond and notices,
10. Bill of Exceptions signed and filed.

BELVA A. LOCKWOOD,
For Appellant.

34 Supreme Court of the District of Columbia.

FRIDAY, *May* 21, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49662.

FRANK M. RUCKER, Adm'r, Pl't'f,
vs.
BELVA A. LOCKWOOD, Def't.

Upon consideration of the plaintiff's motion filed herein to strike out the alleged approval of the defendant's bond on appeal and to dismiss her said appeal to the Court of Appeals, it is ordered that said motion be, and it is hereby overruled.

Memorandum.

June 8, 1909.—Time to file transcript of record in Court of Appeals of the District of Columbia, extended to July 15, 1909, inclusive.

35 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia hereby certify the foregoing pages numbered from 1 to 34, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 49662 at Law, wherein Frank M. Rucker, Administrator of the personal estate of James Taylor, deceased, is Plaintiff and Belva A. Lockwood is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 21st day of June, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2037. Belva A. Lockwood, appellant, *vs.* Frank M. Rucker, administrator, &c. Court of Appeals, District of Columbia. Filed Jun- 23, 1909. Henry W. Hodges, clerk.

Henry W. Hodges
Clerk.

In the Court of Appeals

District of Columbia

OCTOBER TERM, 1909.

No. 2037.

BELVA A. LOCKWOOD,

Appellant.

vs.

FRANK M. RUCKER,

Administrator of the personal estate of James Taylor, deceased.

BRIEF FOR APPELLANT

ASSIGNMENT OF ERRORS AND ARGUMENT

WM. H. ROBESON,
HENRY P. BLAIR,
Attorneys for Appellant.

Hayworth Pub. House, Wash D C

In the Court of Appeals
Of the District of Columbia

OCTOBER TERM, 1909.

No. 2037.

BELVA A. LOCKWOOD,

Appellant.

vs.

FRANK M. RUCKER,

Administrator of the personal estate of James Taylor, deceased.

This suit was brought in the Supreme Court of the District of Columbia. The declaration presents the usual common counts. (Rec. 1 and 2). The defendant pleaded non assumpsit, nil debet, and the general issue, and further averred that the estate of the plaintiff's testator was indebted to her in a given amount. (This claim of set off was not insisted upon.) The case was tried before a jury, and judgment was awarded against the defendant in the sum of $6,-434.22, with interest (Rec. 20), whereupon this appeal was prayed and allowed.

On the trial of the cause the plaintiffoffered in evidence a certain contract between the appellant and the deceased, James Taylor:

This contract recited that the appellant, Mrs. Lockwood, held a certain contract from the Commissioners and Delegates

of the Eastern Cherokees, coupled with the power of attorney, to prosecute in Congress and before the Courts, certain claims of the Eastern Cherokees, among them a claim for "their pro rata share of the $4,409,962.46, found due to the Cherokee Nation in an accounting by the Secretary of the Interior, and in accordance with an agreement made with the Cherokee Nation at Tahlequah, Indian Territory, December 19, 1891. * * * "

The contract continues:

> And whereas this contract contains a promise of a fee of 15 per cent to the said party of the first part, for her services rendered, and to be rendered, and whereas the said James Taylor, party of the second part, has also rendered valuable services in the above recited claims, and intends to continue such service, it is therefore agreed by and between the parties to this contract, that in consideration of mutual service rendered, and to be rendered, and other good and valuable considerations between the parties hereto, that the said parties of the first and of the second part shall be equally interested in each and every recovery that may be had, or allowance made or secured through thees premises, * * * (Rec. 10.)

The defense to the suit was that Mrs. Lockwood had collected nothing under the said contract; that the fee allowed to her by the Court of Claims, one-half of which Taylor's administrators sought to recover, was allowed by reason of an independent service, not comprehended within, nor contemplated by the said contract, and not participated in by the plaintiff. It was contended for the defendant that the employment in which she was associated with the plaintiff was a continuing one, and that she was still engaged in the prosecution of the claims of the individuals claiming to be Eastern Cherokees, for their pro rata shares in the particular fund; and that, if she recovered for the individuals in whose behalf she and the plaintiff were mutually interested, she would owe

the plaintiff his proportion of such fees as might be derived from that employment; but that the fee allowed her by the Court of Claims was not allowed by reason of her employment by the persons whom she represented in connection with the plaintiff.

On the trial of the cause, James L., and William Taylor, two of the sons of the deceased plaintiff, testified to a certain conversation alleged to have taken place between Mrs. Lockwood and their father. It was alleged by these witnesses that this conversation occurred at a certain hotel in Muskogee. Mrs. Lockwood was asked the question whether that conversation had occurred. (Rec. 16). She was not allowed to answer this quesion, on the ground that Section 1064 of the Code of the District of Columbia forbade a living litigant to testify "to any transaction with or declaration or admission of" the deceased party, in an action between the living party and the representative of the deceased party.

Mrs. Lockwood had sent James Taylor, the deceased, $1,000 and plaintiff claims had stated that she expected to send him more. (Rec. 16). She was asked as to the relations between her and the family of James Taylor and her counsel stated to the court that it was his purpose to show that the relations between them were intimate and that the thousand dollars remitted to the deceased by Mrs. Lockwood represented a portion of the fee she expected to recover in the prosecution of the individual claim for enrollment, and counsel asked her whether she thought at that time that there would be an additional sum due James Taylor out of the fees that she expected to recover for such services. This question the court declined to allow her to answer.

II. ASSIGNMENT OF ERRORS.

1. The court below erred in sustaining the objection of the plaintiff and refusing to allow the defendant to answer the question propounded to her by her counsel as to the testimony of the witness James L. Taylor (R. p. 16).

2. The court below erred in sustaining the objection of the plaintiff and refusing to allow the defendant to answer the question propounded to her by her counsel as to the testimony of the witness William Taylor (R. p. 16).

3. The court belowe erred in sustaining the objection of the plaintiff and refusing to allow the defendant to answer the question propounded to her by her counsel as to any admission made by her in the conversation testified to by the witnesses, James L. Taylor and William Taylor (R. pp. 16-17).

4. The court below erred in sustaining the objection of the plaintiff and refusing to allow the defendant to answer the question propounded to her by her counsel as to the relations between the family of the decedent and her own family (R. p. 17).

5. The court below erred in sustaining the objection of the plaintiff and refusing to allow the defendant to answer the question propounded to her by her counsel as to the amount due to the decedent on account of the powers of attorney introduced in evidence by the plaintiff in the case (R. p. 18).

6. The Court below erred in sustaining the objection of the plaintiff and refusing to allow the defendant to answer the question propounded to her by her counsel as to whether any of the 856 powers of attorney involved in the contract introduced by the plaintiff in evidence had ever been delivered to the defendant by the decedent (R. p. 18).

7. The court below erred in not holding that the recovery by Mrs. Lockwood in the Court of Claims was under a contract entirely distinct and independent of the contract between Mrs. Lockwood and James L. Taylor.

8. The court below erred in not holding that the service performed by Mrs. Lockwood, for which she received a compensation of $18,000, was rendered in pursuance of a contract in which James Taylor had no interest.

III. ARGUMENT

We desire at the outset to lay stress upon the fact that the testimony offered in the court below by appellant, and which the court refused to admit, was in rebuttal of evidence given by interested parties (the two sons of decedent). It was not affirmative testimony as to the substance of what appellant said to the decedent, but it was simply a general denial of the truth of statements made by such interested parties. It will also be noted that the testimony of James L. and William Taylor, which appellant sought to rebut, related to statements made by appellant and not to any "declaration or admission of the said deceased."

There has been no decision by this Court sonstruing Section 1064 of the Code upon the exact state of facts obtaining in this case. While there have been cases in which the Court has sustained the application of this rule of exclusion, we respectfully submit that in none of them has so burdensome a construction of it been given as by the Court below and in none of them have there been present such well defined reasons for adopting a liberal construction and application of the rule as exist in this case. For example, in Dawson v. Waggaman, 23 App. D. C. 428, testimony was admitted to prove the dying declaration of the deceased to show the intent of testatrix to dispose of certain personal property by will, rather than by an alleged gift *causi mortis*. This testimony was admitted upon the ground that it was a part of the *res gestae,* but the testimony of a claimant against the estate of deceased, purporting to prove certain conversations with the deceased establishing an intent contrary to that expressed in the will, was held to be inadmissible by virtue of section 1064. Here the opposite party did not undertake to prove the substance of these conversations, and the claimant was not undertaking simply to rebut testimony as to their import, as in the case now before the Court, but the claimant herself first undertook to prove such conversations, in order to substantiate her claim to the gift *causi mortis,* and the Court declined to admit such affirmative testimony. Mankey v.

Willoughby, 21 App. D. C. 314, and Jones v. Slaughter, 28 App. D. C. 43, in like manner are easily distinguishable from the instant case.

In Tuohy v. Trail, 19 App. D. C. 79, this Court entered upon an extended and instructive discussion of the purpose and meaning of the rule in question. That was an action by a daughter against the administrator of her deceased father's estate to recover for services performed for the decedent during his lifetime. In the course of the trial, plaintiff herself became a witness in her own behalf to prove the nature and extent of the services rendered and the value threof, but not to prove the contract or understanding with her father, under which the services were performed. This testimony was admitted by the trial court and in that connection Mr. Chief Justice Alvey, speaking for the Court, says:

> With respect to the first question raised by the erors assigned, that as to the competency of the plaintiff to testify as a witness in her own behalf, we perceive no error in the ruling of the court below. The Revised Statutes, United States, Sec. 858, provides: "That in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, *as to any transaction with, or satement by, the testator, intestate, or ward, unless* called to testify thereto by the oppsite party, or required to testify thereto by the court." The statute is a remedial one, intended to remove technical disqualifications in the common-law rules of evidence, and to promote the fair administration of justice, and should, therefore, be liberally construed to accomplish the end in view. Texas v. Chiles, 21 Wall. 488. In actions by or against executors or administrators the parties are not rendered wholly incompetent, but only as to matters immediately and directly relating to the transaction between the parties thereto, and to which both could testify on terms of equality if both were

living. The reason and policy of the statute is to provide that when one of the parties to a controverted transaction is silenced by death, the other shall be silenced by law. Whart. Ev., Sec. 466. It is to be observed that the statute, by its terms, only excludes proof by the surviving party of transactions with, or statements by, the deceased party, but does not make the surviving party incompetent as to other matters. The performance of the services claimed for, and the value thereof, are facts apart from and independent of the alleged contract or understanding with the deceased. The services may have been performed, and doubtless would have been, without any contract or understanding with respect thereto; and, as independent facts, they may have been proved or disproved by any witness with knowledge upon the subject, and wholly irrespective of any contract.

This is not a new question upon the construction of the statute. The code of the State of Tennessee contains a provision identical with the provisions of the Revised Statutes of the United States, in respect to this matter, and the Supreme Court of that State has held, that, in an action against an administrator, the plaintiff was competent to testify in his own behalf in regard to any subject not the controverted transaction between the deceased and the surviving party. Minnis v. Abrams, 105 Tenn. 662. Here the controverted transaction alleged to have occurred between the father and the daughter, is the contract or understanding that the daughter was to be compensated for her services (conceded to have been rendered) either in the lifetime of the father or by a provision in his will. It is not controverted or denied that the services were rendered, but it is denied that there was any agreement or understanding in regard to compensation therefor. We think it clear that the plaintiff was competent to testify as to the fact of the rendition of the services, and the

value thereof, though not as to any contract or understanding with her father as to compensation.

The case of Lewis v. Merritt, 98 New York 206, is a later expression than Pinney v. Orth, 88 New York 447, cited by the court below as being nearest in point upon this question. To quote from the later case:—

> "The provision of the Code of Civil Procedure (Sec. 829) prohibiting a party to an action rom testifying in his own behalf against an executor, etc., of a deceased person concerning a personal transaction or communication between the witness and deceased person, does not necessarily and under all circumstances, exclude the evidence of a party, so testifying, when it tends only to negative or affirm the existence of such a transaction or communication. The object and intent of the restriction placed upon the survivor, of those engaged in personal dealings and transactions, from giving evidence in relation thereto, will be accomplished, if it is limited to cases which preclude him from giving such evidence when it is offered for the purpose of establishing an affirmative cause of action or defense. It is difficult to lay down any general rule which shall cover all possible transactions, but it is safe to say when a party gives material evidence as to extraneous facts, which may or may not, involve the negation or affirmation of the existence of a personal transaction or communication with a deceased person, that the adverse party, although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of such personal communications or transactions. We think this question is controlled by our decision in Pinney vs. Orth (88 New York 447). There a witness had testified to certain interviews oc-

curring between the defendant and the appellant's intestate during his life time, and which was held competent for the defendant to testify that he never had interviews with the deceased person at the place and under the circumstances described by the appellant's witnesses. This decision proceeded, not upon the ground that the appellant had given affirmative evidence of personal transactions or communications with the intestate, but upon the broad ground that the application of Section 829 does not extend so far as to preclude the party from testifying to extraneous facts and circumstances, tending to show that a witness for an adverse party has testified falsely, even though he is thereby called upon to negative the existence of personal transactions and communications between himself and the deceased.

"We are therefore of the opinion that the evidence referred to was competent on the two grounds:

First. Because it was justified by the affirmative evidence given by the plaintiff reflecting upon the same transaction and communication: and

Second. Because it was competent for the defendant to give evidence of any extraneous facts and circumstances which tended to show the falsity of the evidence given by the plaintiff, although such facts also incidentally tended to establish the inference that a personal transaction or communication between the witness and testatrix had taken place."

Wadsworth, as administrator, etc., respondent, vs. *John Heermans,* appellant, 85 New Yok 639, was an action "brought by plaintiff's intestate to recover possession of two bonds payable to the order of the Treasurer of the Utica Horseheads & Elmira Railroad Company. After the action was tried and pending this appeal the original plaintiff, Joseph F. Hill, died, and the present plaintiff was substituted. The evidence tended to show that when Mr. Hill received the bonds in question they were endorsed in blank by the Treasurer of the

said Railroad Company. They were placed in a private drawer in a safe used by Hill and Fellows. The latter claimed that the bonds were purchased for him by Hill, acting as his agent. At the trial the bonds were found to have the blank indorsement filled in by the name of Fellows.

Hill, as a witness on his own behalf, at the trial, was asked: "At the time you left those bonds in the safe was the name of Mr. Fellows in either of these indorsements?" and also: "Was the name of Joseph Fellows anywhere in these instruments at that time?" These questions were objected to on the ground that the evidence was incompetent under Section 829 of the Code, and necessarily involved a personal transaction with Fellows, who was dead. The Court says: "We do not think the inquiry involved any personal transaction between Hill and Fellows. It represented merely the then condition of the bonds. It neither affirmed nor negatived any personal transaction between the two. Whether it was done with the consent or without the consent of Hill, because of a transfer by him, or through a mistake by Fellows would have involved a personal transaction between the two. Those were the material inquiries and were excluded. That the names were not in the bonds when Hill left them in the safe, amounted only to a description of the bonds as those left. Neither in its essential nature, nor by reason of the proofs did it involve a personal transaction between the two, either by way of affirmation or denial. Both Hill's knowledge and Fellow's act were in their essential character separate and independent to each other. We must enforce the rule fairly, but draw the line somewhere. It is not always easy to do so with entire certainty and precision. We hesitate less in this case, because if the line is not drawn at the line adopted, it is difficult to say where it can be drawn at all. Inferences may then be framed out of the most independent facts. When Hill testified that he bought the bonds of Redbourn and put them among his own papers in the safe, it might be said inferentially to negative any personal transaction with Fellows by which the bonds were to be bought for him. The rule must be applied in the

case to the facts as they arise, but without pushing it to extremes beyond its natural application. It may also be observed that there is great justice and fairness in the ruling below. The assignee was allowed to show the condition of the bonds at one time with the name of Fellows in. Was it then improper for Hill to show their condition at another time with the name of Fellows out? Did not the dead man have enough of advantage when he was allowed to reach out from his grave and put into the middle of this trial his declaration in writing that he owned these bonds? The spirit and purpose of this act is equality, to prevent undue advantage, and that purpose should be kept in view when border questions arise and lines of distinction are to be drawn. We think the courts below applied the rule fairly and committed no error in overruling the objections."

Certainly the "spirit and purpose" of the similar provision of the District Code in a like manner aims at equality and to prevent undue advantage. But can it be said that this spirit and purpose is accomplished when the rule is so applied as to admit evidence by two interested parties, sons of the deceased on behalf of whose estate the litigation has been initiated, and to exclude testimony in rebuttal by another witness whose bias can be no greater than theirs. In Pitzl vs. Winter, 96 Minn. 499, 5 L. R. A., page 1009, New Series, the Supreme Court of Minnesota held that a statute similar to that invoked for the exclusion of applicant's testimony in this case was not enacted solely "for the benefit of the estate of the deceased party," but that in order to preserve the spirit and purpose of the rule—which is equality—it might properly be invoked by the other party. Under this interpretation the testimony of the two sons, who could not in the nature of things have been *disinterested* witnesses, would also have been excluded.

Suppose Mrs. Lockwood had offered to testify that she was never in Muskogee. Such a statement would have refuted, of course, the testimony of James L. and William Taylor, that a certain conversation had occurred in Muskogee. Mrs. Lockwood was asked the question whether that certain conversa-

tion occurred (Rec. 16). She was not allowed to answer this question. If she could have testified that she was never in Muskogee (and, of course, such testimony would have been admissible), she had the right to testify that she never had the conversation.

The plaintiff could not have rested his case without proving his conversation with Mrs. Lockwood. Did that conversation occur? James and William Taylor say "yes." Mrs. Lockwood was denied the opportunity to say "no." And this was done for the reason that the statute says a living litigant shall not testify to a "conversation or transaction" with a deceased person. Mrs. Lock wood was not asked to say what the conversation was. She was merely asked the question whether she had had the conversation detailed by James L. and William Taylor. The administrator introduced testimony to show that she had that conversation; and she was not permitted to deny it. Is the purpose of the statute to put a living and a dead party on an equality effectuated by such a refusal?

The objections to the narrow interpretation of the rule adopted by the lower court in this case, are summed up so clearly by Wigmore in his masterly work on Evidence that we feel justified in incorporating here the major part of his criticism, as follows: (Vol. I Wigmore on Evidence, Chapter XXIII, Sec. 578).

> In almost every jurisdiction in the United States, by statutes enacted in connection with or shortly after the statute removing the general disqualification by interest, an exception was carved out of the old disqualification and was allowed to perpetuate within a limited scope the principle of the discarded rule. It does not appear that there was any precedent which could have served as an example; and the almost universal vogue of this modern fragment of the old anomaly is therefore the more remarkable. The scope of this modern rule excludes the testimony of the survivor of a transaction with a decedent, when offered against the latter's estate. The defenders of this rule are usually content

to invoke some vague metaphor in place of a reason, but occasionally there is found an attempt at a rational justification:

1878, Haymond, J., in Owens v. Owens, 14 W. Va. 88, 95: "The law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confont the survivor, or give his version of the affair, or expose the omissions, mistakes, or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscruplous."

The argument of the latter passage, that a contrary rule "would place in great peril the estates of the dead" sufficiently typifies the superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof? The truth is that the present rule is open, in almost equal degree, to every one of the objections which were successfully urged nearly a century ago against the interest-rule in general. Those objections may be reduced to four heads: (1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable; (4) That in any case the test of the cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decisions. Every one of the first three objec-

tions applies to the present rule as amply as to the old and broader rule. The fourth applies with less apparent force, because the opponent's testimony is lacking in contradiction. And yet, upon what inconsistencies is based even this support for the rule! For its defenders in effect declare the lack of this opposing testimony to be the sole ground for an exceptional rule adapted to that particular situation; and yet, since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor; so that the rule rests on the supposed lack of a questionable species of testimony equally weak with that which is excluded. There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the application of the complicated statutes defining this rule; and the result is a mass of vain qualities which have not the slightest relation to the testimonial trustworthiness of the witness:

1895, Corliss, J., in St. John v. Lofland, 5 N. D. 140, 64 N. W. 930: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent, is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal

armory, there is a weapon whose repeated thrusts he will find difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods,—the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."

As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decisions than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.

The hardship wrought by strict adherence to the rule, which, as Wigmore points out, may be much more dangerous and burdensome and far more conducive to the miscarriage of justice than its too liberal interpretation, is well exemplified in this case. Here are two witnesses, sons of decedent, more directly interested in this claim against appellant than is the nominal plaintiff, the administrator; and to this testimony, necessarily biased, appellant was not permitted under the rule as applied to interpose even a general denial. It is not fair to assume that the legislature, in qualifying the rule so as to admit the testimony of the survivor whenever "the opposite party" shall first testify as to the transaction, had in mind that the words "opposite party" should include any witness testifying on behalf of such opposite party?

The principle upon which the rule is based is mutuality and equality—maxims dear to the law. If no person other than the surviving party has knowledge of the "transaction" it might be reasonable and necessary to exclude the affirmative testimony of such survivor in the interests of mutuality and

equality; but where witnesses are offered by the opposite party representing decedent, can it be that equality demands the silencing of the survivor so as to invalidate the only means of defense left to him? Is this not weighing down the scales of justice too much in favor of the deceased and placing the survivor too much at the mercy of his representatives?

In deciding this appeal the Court is untrammelled by precedent, controlling in this jurisdiction, and we entertain the confident hope that it will adopt a broad and liberal view of the important question involved.

W. H. ROBESON,
HENRY P. BLAIR,
Attorneys for Appellant.

IN THE

Court of Appeals of the District of Columbia.

October Term, 1909.

No. 2037.

BELVA A. LOCKWOOD, *Appellant,*

vs.

FRANK M. RUCKER, *Administrator.*

REPLY BRIEF FOR APPELLANT.

W. H. ROBESON,
HENRY P. BLAIR,
Attorneys for Appellant.

WALLACE & CADICK, PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia

October Term, 1909.

No. 2037.

BELVA A. LOCKWOOD, APPELLANT,

vs.

FRANK M. RUCKER, ADMINISTRATOR.

Reply Brief for Appellant.

The appellant submits the following reply brief in review of the authorities cited by the appellee during the argument, but not contained in his brief when filed:

The question involved in Potter *vs.* Third National Bank, 102 U. S., 163, was the right of a witness who was not a party to the cause to testify as to the statements of the defendant's testator, touching the subject matter in controversy, and the Supreme Court held that such a witness, not a party to the cause, was not inhibited from testifying by virtue of

Section 858 of the Revised Statutes. In effect the same question would have been presented if Mrs. Lockwood had attempted to prevent one of the Taylors from testifying by reason of the prohibition of the Statute.

The case of Snyder *vs.* Fiedler, 139 U. S., 478, is entirely apart from the present case. There the widow of the decedent was first appointed his administratrix. She entered suit against Fiedler and offered herself as a witness at the trial of the cause. Objection was made to her testimony under the Revised Statute. The objection was sustained, a juror withdrawn and a continuance had. The widow then resigned as administratrix, and Fiedler was appointed her successor. He was then substituted as plaintiff in the suit which she had instituted. At the next trial the widow was offered as a witness on behalf of the administrator and her testimony was objected to under the Section of the Revised Statute. She was permitted to testify by the Court and the error assigned for this action was the sole ground considered by the Supreme Court, which decided that she was entirely competent as a witness and that there was no error in the action of the trial court.

In this connection it is to be noted that by Section 858 of the Revised Statutes of the United States "neither party shall be allowed to testify against the other, as to any transaction with or statement by the

testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court."

These provisions are entirely different from the situation in the case at bar, since Section 1064 only inhibits the surviving party from testifying under the conditions set out for the evident purpose of maintaining equality between the parties. The facts in the case at bar and in Snyder *vs.* Fiedler, as well as the two statutes under consideration, render the Supreme Court decision of no assistance to the appellee, Rucker, as an authority in the present proceedings.

In Pattee *vs.* Whitcomb, 72 N. H., 249, the question involved in the testimony was the opinion of the witness as to the quality of the mind of the deceased and whether he could be easily influenced or not. This witness was one of the parties to the cause. The court held that the evidence was properly excluded under the statute, although it is also suggested that whether the appellant and witness should not have been permitted to testify in rebuttal as to certain facts about which he was not otherwise competent to testify, was a question which the record did not present for consideration.

A rehearing was had in this case (which the learned justice below appears to have overlooked as well as counsel for the appellee, Rucker) and a new trial granted, reversing the first opinion on the

explicit ground that the evidence was competent as matter of law under the authorities cited in the original opinion.

In Heyne *vs.* Doerfler, executor, 124 N. Y., 505, the plaintiff, Heyne, *over the objection* of the defendant executor gave direct testimony of personal transactions and communications with the deceased and *on this testimony* recovered a judgment against the defendant executor. On appeal the admission of this testimony to establish the plaintiff's case was held error and the judgment reversed on that ground.

Holcomb *vs.* Holcomb, 95 N. Y., 316, would apparently exclude the two Taylors as witnesses in the present case, for at page 324, speaking of the interpretation of section 829 of the New York code and referring to witnesses who were not parties to the suit as well as those who were, the Court says:

> "There was also error in disregarding the prohibition of the statute (Code section 829) as to evidence of personal transactions and communications between certain persons and the deceased. (1) They were interested in the event of the action, because a recovery would create or increase a fund, in the distribution of which they would share. The defendant derived his title by assignment from the deceased person, and that title is the particular claim sought to be affected by their testimony."

The other New York cases were discussed on the argument.

In Taylor *vs.* Bunker, 68 Mich., 258, the plaintiff sought to testify in support of his demand against an estate over the objection of the defendant administrator, as to personal transactions with the deceased by the plaintiff. This testimony was excluded, and its exclusion held right as matter of law under the Michigan statute cited at page 259 of the opinion.

This case would have been authority here if Mrs. Lockwood had been the plaintiff in the this case, suing Rucker, administrator, and attempting to testify in support of her cause of action over his objection.

Downey *vs.* Andrus, 43 Michigan, 65, was based on exactly the same conditions as the Taylor case in 68 Michigan, which cites it as an authority for the later decision.

Downey filed a claim against the estate of his mother of which Andrus was administrator. His proof failed him and he sought to testify on his own behalf in respect to the transaction on which his cause of action was based. This testimony was held to have been rightly rejected.

The court, after reviewing the Michigan cases at length, concluded:

> "After this tedious reference it is only necessary to say that the cases demonstrate the correctness of the ruling made by the referee. The excluded offer was, in substance, to make out a case by the claimant's statements of cer-

tain facts which were known only by himself and decedent, and the claimant's right to swear to these facts is attempted to be defended on the ground that third persons were present, but who, after all, had no knowledge of these facts, and were not interested in the transaction, or apparently regarded by the immediate parties as persons to whom they were minded to explain the business relations between them as mother and son.

"There is no error and the judgment is affirmed with costs."

It is respectfully submitted that the effect of all these authorities, in so far as they are valuable in the present case, is to point out the uniform effort of the courts to establish equality and mutuality in the construction of statutes governing the exclusion or admission of evidence, where one of the parties to the original transaction is dead.

W. H. Robeson,
Henry P. Blair,
Attorneys for Appellant.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

BELVA A. LOCKWOOD,
Appellant,
vs.
FRANK M. RUCKER, ADMR.,
Appellee.
} No. 2037.

BRIEF ON BEHALF OF APPELLEE.

This suit was brought by the appellee against the appellant, upon the Common Counts, especially upon the count for money had and received by the appellant for the use of the appellee.

A verdict was returned in favor of the appellee, and, a motion for new trial being overruled, judgment was entered upon the verdict, and this appeal has been prosecuted therefrom.

THE MOTION TO DISMISS THE APPEAL.

In the lower Court the cause was heard before Justice Stafford, who was presiding in the Circuit Court. A few days before the expiration of the twenty days within which an approved appeal bond must be filed under the provisions of Rule X of this Court, the appellant in person presented a bond to act as a supersedeas to Mr. Justice Barnard, who was presiding in the Equity Court, and he approved it. No notice of the application for the approval of the bond was given to appellee or his attorneys, as required by Rule 105 of the Supreme Court of the District of Columbia, then, and now in force, and it is submitted that the approval of the

bond was inoperative and void. A motion to strike out the approval of the bond and dismiss the appeal was made in the lower Court (Rec., p. 8), but was denied (Rec., p. 20), no reasons being assigned by the learned judge for denying the motion.

The motion has been renewed in this Court, and the appellee contends that it should prevail. Rule X provides that an approved bond shall be filed, and Rule 105 fixes the prerequisites to approval, and this Court takes judicial notice of said rule, and no doubt had its provisions in mind when Rule X was formulated. Very recently the lower Court, after conference with Your Honors, readopted Rule 105, making its provisions a little more stringent, if anything. It will be contended that the failure to give notice is a mere irregularity and the case of the Brick Company against Rothwell (18 Appeals, 546), may be cited; but that was a case in which the motion was made in this Court for the first time, no motion to strike out the approval of the bond having been made at all in the lower Court, and none in this, until after the appellants had gone to large expense for the transcript of the record, and its printing and the case was just to be called for argument upon its merits. We think the motion to dismiss should be granted.

ON THE MERITS.

The claim by the plaintiff grew out of a contract between his intestate, James Taylor, and Belva A. Lockwood, the defendant, for the division of certain fees. The sole question of fact for the jury was whether the money collected by Mrs. Lockwood, under the decree of the Court of Claims was the money referred to in the contract. It was conceded that this was the only fact in controversy by counsel for both sides, they having gone so far as to agree upon what credits Mrs. Lockwood was entitled to upon the

$18,000 received by her (Rec., p. 16; also Court's Charge, Rec., p. 19).

The jury found that the plaintiff was entitled to one half of this net amount and the Court refused to disturb the verdict. (Rec., p. 4.)

The ruling sought to be reviewed here is that holding that Mrs. Lockwood was not a competent witness to give her version of a conversation between herself and James Taylor, who is now dead, and whose administrator is suing for money due under a contract between her and Taylor.

Taylor's two sons had testified under a commission that a certain conversation was had at Muskogee between Mrs. Lockwood and their father, who is dead. The fact that such a conversation took place is admitted. Taylor is dead, and the Court held that Mrs. Lockwood cannot speak. If the positions were reversed Mrs. Lockwood's side would have witnesses and Taylor's side would have none.

The statute, Section 1064 of the Code, was intended for just such cases and the construction placed upon it by the Court is the correct interpretation of it. (See opinion of Court, Rec., pp. 4, 5, 6.) "The statute is a just one." (Dawson *vs.* Waggaman, 23 Appeals, 428.)

The lower Court had the right to allow or refuse to allow Mrs. Lockwood to testify by calling her itself. It did not see fit to exercise this discretion and its failure to exercise such a discretion is not subject to review. It is, therefore, respectfully submitted that the judgment should be affirmed.

CHARLES A. MAXWELL,
SAM'L A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.